UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

RHCG SAFETY CORP.,
Respondent

and **Cases 29-CA-161261 and 29-RC-157827**

CONSTRUCTION & GENERAL BUILDING LABORER, LOCAL 79,
Charging Party

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Dated at Brooklyn, New York
This 27th day of July, 2016

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I. PROCEDURAL HISTORY

On August 12, 2015, the Construction & General Building Laborers Local 79, LIUNA ("the Union" or "Charging Party") filed a petition in Region 29 of the National Labor Relations Board seeking to represent all full-time and part-time demolition workers of RHCG Safety Corp., ("Respondent"). (GC. Ex. 1)[1]. Thereafter, the parties entered into a stipulated election agreement and an election was conducted on September 18, 2015. The challenged ballots were determinative to the outcome of the election and objections to the conduct of the election were subsequently filed by both the Respondent and the Charging Party.

On October 2, 2015, the Charging Party filed a charge in Case 29-CA-161261 against Respondent and a copy was served via U.S. mail on October 5, 2015. (GC Ex. 1). On November 30, 2015, the Charging Party filed an amended charge in Case 29-CA-161261 and served a copy on the Charging Party on December 2, 2015. (GC Ex. 1)

On December 18, 2015, the Regional Director of Region 29 issued a Complaint and Notice of Hearing in Case 29-CA-161261, alleging, *inter alia*, that Respondent engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, ("the Act"), by interrogating employee Claudio Anderson about his Union activity and terminating Anderson because of his Union activities and to discourage employees from engaging in these or other concerted activities and by threatening employees with job loss and reduction of wages if the employees selected the Union as their collective bargaining representative. (GC Ex. 1).

On January 4, 2015, Respondent filed an Answer to the allegations set forth in the Complaint. (GC. Ex. 1).

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[1] As used herein, "Tr." refers to the page in the transcript, "GC Ex." refers to General Counsel's exhibits, and "R Ex." refers to Respondent's exhibits.

Subsequently on February 17, 2016, the Regional Director issued a supplemental decision on the challenges and objections and consolidated the Unfair Labor Practice allegations alleged in the December 18 Complaint with outstanding challenges and objections to the conduct of the election to be heard concurrently at hearing. (GC Ex. 1)

A hearing before Administrative Law Judge Raymond Green ("the ALJ") was conducted in Brooklyn, New York, on various dates between March 1 and April 1, 2015.

On May 18, 2016, the ALJ issued a Decision and Recommended Order ("the Decision") in the above captioned case finding that the Respondent unlawfully interrogated Claudio Anderson by text message and unlawfully terminated Anderson to discourage Union activity in violation of sections 8(a)(1) and (3) of the Act. The ALJ found that Respondent's Supervisor Scherrer sent a text message to Anderson interrogating him about whether he was working for the Union. The ALJ held that the text message demonstrated the employer's knowledge of Anderson's Union activity, and that Respondent subsequently informed Anderson that there was not work for him with Respondent. The ALJ found "…that the reason for Anderson's discharge was the company's belief that he was becoming involved with the Union." (Decision at 4). The ALJ further found that the Voter list provided to the Union for the September 18, 2015, election did not comport with the requirements of *Excelsior Underwear*, 156 NLRB 1236 (1996) and found that the failure to submit an accurate and adequate *Excelsior* list was "…sufficiently serious to set aside the election and hold a new one." (Decision at 6).

The ALJ's recommended Order provides that Respondent shall reinstate Anderson to his former job or a substantially equivalent position, remove any reference from its files of Andersons discharge, make him whole for any loss of earnings, and post a Board notice to employees reflecting the relief ordered.

II. RESPONDENT'S EXCEPTIONS

On June 29, 2016, Respondent filed Exceptions to the Decision and a Brief in Support of the Respondent's Exceptions. Pursuant to 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel hereby submits this Answering Brief in Reply to the Respondent's Exceptions and supporting brief.

Respondent lists 129 Exceptions to the Administrative Law Judge's 8 page decision. Each of Respondent's Exceptions is without merit and Counsel for the General Counsel urges the Board to affirm the ALJ's decision. For the sake of brevity, the Counsel for the General Counsel will respond to the exceptions generally.

Respondent attacks the ALJ's credibility assessment and finding of fact throughout its exceptions. It is axiomatic that the Board gives broad deference to and will not overturn an administrative law judge's credibility findings unless it is convinced by a clear preponderance of the evidence that those credibility resolutions are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951), *Storer Communications, Inc*., 297 NLRB 269, fn.2 (1982), *Upper Great Lakes Pilots, Inc*., 311 NLRB 131 (1993).

Respondent also excepts to the ALJ's determination that the Respondent's Supervisor Sherrer interrogated Anderson. In objecting to this finding, the Respondent argues that by asking him if he was working for the company or the union, Scherrer was not interrogating the employee. The Respondent also objects to the Judge's decisions with regard to Exhibits GC Ex. 3(a) and (b), screenshots of text messages taken by Claudio Anderson of his unlawful interrogation by Scherrer. Respondent attacks the text messages largely because they are so damning. Respondent argues that the judge erred in admitting the text messages, in giving them any weight, and in his interpretation of the text messages based on his plain reading of the text messages.

Respondent also excepts to the determination of the ALJ that Respondent terminated Anderson, arguing that the ALJ was incorrect in finding that the Respondent terminated Anderson, that the Respondent had knowledge of Anderson's union activity, and that Respondent terminated him for Union activity.

For all of the reasons discussed below, Counsel for the General Counsel respectfully requests that the Board reject each of Respondent's Exceptions. It is further urged that the Board adopt each and every of the Administrative Law Judge's Findings of Fact, Conclusions of Law[2], and order any further remedy deemed just and proper.[3]

III. JURISDICTION

The Respondent, in its Answer to the Complaint, admitted and the ALJ found that, that at all material times, it has been a domestic corporation with an office and place of business located at 83 East Main Street, Bay Shore, New York, and place of business located at 112 12th Street, Brooklyn, New York, and has been engaged in providing construction services; that during the past twelve month period, which period is representative of its operations in general, Respondent, in conducting its operations purchased and received at Respondent's Bay Shore facility goods, materials and supplies valued in excess of $50,000, directly from points located outside the State of New York and that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. (GC. Ex. 1).

[2] Counsel for the General Counsel has filed a limited cross-exception to the ALJ's failure to rule on Counsel for the General Counsel's request for a make whole remedy that included interim earnings. The merits of that cross-exception are argued in a separate submission.

[3] Respondent also filed objections to the ALJ's Order for a re-run of the Election in Case 29-RC-157827, on the grounds that the Respondent did not provide a proper *Excelsior* list. Counsel for the General Counsel will not address the ALJ's findings in this matter because the General Counsel was not a party to the representation case proceedings.

IV. STATEMENT OF FACTS

All relevant and material facts have been completely and accurately set forth in the Administrative Law Judge's Decision (ALJD 2-5), except as otherwise noted herein. Counsel for the General Counsel does not except to any of the ALJ's factual findings but presents a synopsis of the facts in response to Respondent's exceptions to the ALJ's factual findings.

A. Background

Respondent is a construction company which primarily conducts concrete work and demolition work at locations throughout New York City. (Tr. 478). Christopher Garofalo (Garofalo) is the Vice President of Operations and oversees the Demolition work done by Respondent, while Tommy Frangipane is the Vice President of Operations who oversees Respondent's Concrete work. (Tr. at 474 & 477). Garofalo's authority in his role as Vice President of Operations supersedes everyone in the demolition division and he retains the authority to hire and fire employees and assign work. (Tr. at 476-477). Supervisors may recommend hiring employees and they are approved by Garofalo. (Tr. at 496). Supervisors may also terminate employees and may do so without consulting Garofalo though they typically do inform Garofalo. (Tr. at 496).

David Scherrer (Scherrer) is a supervisor in Respondent's concrete division. (Tr. at 277-278). Scherrer's direct superior is Tommy Frangipane. (Id.) Scherrer directs work assignments of employees and directs crews and gives assignments to employees working on jobsites that he supervises. (Id.) When work at a jobsite ends, Scherrer himself selects which employees will follow him to the next jobsite and other employees may be directed to another jobsite by Tommy Frangipane, to whom Scherrer answers. (Tr. at 277-78). If Scherrer needs employees on a jobsite, Scherrer contacts Frangipane who will send workers to Scherrer for that particular job.

(Tr. at 280). There are several other concrete supervisors overseeing work at multiple job sites. Those supervisors also answer to Fragipane. Frangipane did not testify during the hearing.

Scherrer is also responsible for the daily direction of employees on the jobsites he oversees and testified that he directed the work of employee Claudio Anderson at jobsites at 2301 Tillotson Avenue and 5740 Broadway, both in the Bronx, New York. (Tr. at 284-285, 290). Scherrer was also the individual whom Anderson requested and received time off from when he requested leave in July 2016. (Tr. at 285, 290-91).

B. Interrogation and Termination of Claudio Anderson

Claudio Anderson was an employee of Respondent who began work on August 5, 2014. (Tr. at 31). Anderson's last day of work was July 23, 2015; Anderson was supervised by Scherrer at 5740 Broadway and 2301 Tillotson Avenue, which were Anderson's last assignments before his termination. (R. Ex. 3).

While being supervised by Scherrer at 2301 Tillotson Avenue, Anderson requested one month off from work to visit Panama City, Panama. (Tr. at 36). Scherrer granted Anderson's request for time off and Anderson took time off beginning immediately after Scherrer granted his request. (Tr. at 36-37). Scherrer acknowledged that he granted the request for time off. (Tr. at 285).

Within the first few days after his request for time off in July 2015, Anderson went to Local 79 and filled out paperwork.[4] (Tr. at 35). When Anderson visited Local 79, he was not

[4] Anderson testified that he had previously filled out a Union authorization card, which was not among the papers he filled out the day he visited the Union office. The Respondent excepts to the ALJ finding that "Anderson visited the office of the Union and among other things signed a union authorization card." (Decision at 3). Anderson testified that he had previously filled out a union authorization card and later went to the Union hall to fill out additional union paperwork. (Tr. at 35) The ALJ's minor misstatement about when the authorization card was signed is insufficient to warrant setting aside the result.

alone, and there were other employees of Respondent Red Hook at the Local 79 building at the same time. (Tr. at 35).

After two or three days of being off of work, Anderson's mother called him and told him he did not need to go to Panama. (Tr. at 37). Anderson then tried to contact Scherrer both via telephone and text message. Scherrer replied to Anderson via text message. (GC- 3) Anderson testified that Scherrer's text message asked Anderson what was going on with him, and asked Anderson, who paraphrased his recollection of the text messages in his testimony, "…if I work for Red Hook or if I work for Local 79." (Tr. at 37.) Anderson took screen shots of the interrogation which show that Anderson sent a message to Scherrer on July 30, at 4:11 PM[5] asking, "Hi david I can work tomorrow and Saturday?" to which Scherrer responded the same day at 8:36 PM, "What's going on with u?" and "U working for Redhook or u working in the union?" (GC. Ex. 3 and 8).

Phone records from Claudio Andersons phone (GC Ex. 13) and from Respondent Supervisor David Scherrer's phone (R. Ex. 14) both corroborate that a text message was sent from Anderson's phone to Scherrer's phone at 4:11 PM on July 30, and that two text messages were sent from Scherrer's phone at 8:36 PM and 8:37 PM on July 30 to Anderson. Despite not recalling if he texted with Anderson that day, Scherrer did testify that he recalled having a conversation with Anderson and asking him if he had another job, though Scherrer did not recall if that happened via text message, phone call or face to face. (Tr. at 323). Respondent offered no explanation for the phone records showing text messages were sent from his phone to Andersons on July 30.

[5] These times are Eastern Standard Time. Claudio Anderson's phone records are Pacific Standard Time (GC. Ex. 13), and David Scherrer's phone records (R Ex. 14) are Eastern Standard Time.

A few days later on August 4, Anderson went to the jobsite at 2301 Tillotson to speak to David Scherrer in person. (Tr. at 39-40 and 60). During that meeting, Scherrer told Anderson he did not have any work for Anderson. (Tr. at 293). Scherrer told Anderson to speak to Nick Rodriguez. (Tr. at 60). Anderson attempted to call Rodriguez, but Rodriguez did not immediately answer the phone after Anderson called him. Finally Rodriguez returned Anderson's call, and Anderson asked Rodriguez why Anderson could not work for Red Hook. (Tr. at 60-61). Rodriguez told Anderson that Garofalo, who is the boss, said that Anderson and other guys could not work for Red Hook anymore. (Tr. at 60-62). Anderson asked Rodriguez to send him a letter showing the reason Anderson was fired, but Anderson never received a letter. (Tr. at 62). Anderson did not work for RHCG after that date.

Employer records show that between July 25, 2015 and December 30, 2015, Respondent hired 60 demolition employees including 11 who started between July 26 and August 30, 2015. (GC. Ex. 4). Between August 1, 2015 and December 31, 2015, Respondent hired 227 concrete employees including 23 who began work in the month of August alone. (GC. Ex. 9). Among those concrete employee who began working between August 1 and December 31, 2015, 20 worked at the 2301 Tillotson site, including an employee who worked at the Tillotson site August 24, and another who worked there August 31. (GC. Ex. 9).

C. Union files Petition

On August 12, 2015, after Anderson's termination, the Charging Party Union filed a petition seeking to represent demolition employees of Respondent. The parties then entered into a Stipulated Election Agreement and an election was scheduled for September 18, 2015.

V. ARGUMENT

A. The ALJ correctly found that Respondent violated Section 8(a)(1) by interrogating Claudio Anderson.

In his decision, the ALJ correctly held that Respondent violated the Act when Respondent's Supervisor David Scherrer[6] sent a text message to employee Claudio Anderson interrogating him about his union activity, texting, "U working for Redhook or u working in the union?" on July 30, 2015.

1. Applicable Legal Standard

In determining whether the questioning of an employee is unlawful, the Board considers the following factors:

> 1. whether there is a history of employer hostility to or discrimination against protected activity;
> 2. the nature of the information sought;
> 3. the identity of the questioner;
> 4. the place and method of interrogation;
> 5. the truthfulness of the employee's reply.

Intertape Polymer Corp. 360 NLRB No. 114 (2014) citing *Phillips 66 (Sweeny Refinery)*, 360 NLRB No. 26, slip op. at 5 (2014); *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *NLRB v. Hotel Employees Local 11*, 760 F.2d 1006 (9th Cir. 1985).

In this case, the question, "U working for Redhook or u working in the union?" was a question posed to an employee by that employee's direct supervisor. The interrogation about union activity was in response to a question from Anderson to supervisor Scherrer about returning to work after a vacation absence. Anderson sent a text to his supervisor questioning

[6] Respondent did not except to the ALJ's finding that Scherrer was a supervisor within the meaning of 2(11) of the Act. Scherrer is a supervisor on job sites who oversees the daily work of Foremen and concrete employees and reports directly to Tommy Frangipane, the Vice President of Operations for Concrete. Scherrer maintains a high level of independence and is responsible for giving daily work assignments to employees at jobsites, communicating with employees about their daily availability for work, and assigns employees to different jobsites when work at one project ends.

whether work was available, and Scherrer, who is responsible for assigning work responded with two consecutive text messages which said, 1) "What's going on with u?" and 2) "U working for Redhook or u working in the union?" Sherrer's response to a request for work by questioning if the employee is working for the Union is inherently coercive and constitutes a threat that Union activity will result in withholding of work assignments, which in this case was actually coupled by the withholding of work assignments.

Respondent's self-serving explanation that Scherrer was inquiring into Anderson's work availability is belied by the text messages in GC Ex. 3, in which Scherrer repeatedly denied Anderson work despite hiring over 20 concrete workers at Tilotson and other jobsites August alone. Respondent offered no explanation for the rash of hiring, particularly in light of their argument that there was no work for Anderson to do. (GC. Ex. 9.)

The ALJ correctly held that such an inquiring into Andersons's union activity constituted an unlawful interrogation into the Union activity of Anderson.

2. The ALJ's determination that the text messages in GC Ex. 3 were authentic was correct and he was permitted to rely on them in his decision.

Respondent's exceptions dwell on the text messages at issue in this case, largely by ignoring the testimony offered by Claudio Anderson who authenticated the text messages and credibly testified about his interactions with Respondent's agents. Respondent further ignore the corroborating testimony of Ana Taveras, a Union Agent who was able to testify that Anderson sent the Union the text messages as part of the Union's investigation into the Employer's conduct. (See GC-8). Respondent's argument about the text messages in GC Ex. 3 also ignores Respondent's own telephone records in R. Ex. 4, which corroborate that messages were sent matching the time of the unlawful text message.

Claudio Anderson credibly testified that he received a text message from Scherrer asking if he was working for Red Hook or the Union. Further, Anderson took screenshots of the text message and gave an affidavit which he signed on October 21, 2015 stating that he received the text from Scherrer. Those text messages are GC Ex. 3.

Corroborating the authenticity of Anderson's text messages is that fact that on September 24, 2015, Anderson texted the screen shots to Ana Taveras, a union organizer. Taveras was able to provide screen shots from her cell phone showing that she received the text messages from Anderson, known as Panama, as a picture text message in September. (GC Ex. 8).

Respondent's attempt to distract is made all the more obvious by the cell phone records obtained from Verizon and T-Mobile, the cell phone carriers of Scherrer and Anderson, respectively. (See GC. Ex. 13 and R. Ex. 4). Those records show that text messages were exchanged between the phone numbers belonging to the two men on the dates that Anderson testified to and which are reflected in the screen shots in GC Ex. 3. The following chart combines the information showing the phone records from each cell phone carrier (GC Ex. 13 and R Ex. 4) along with the way that they match up against the text messages in GC Ex. 3. In his decision, the ALJ found that the cell phone records in GC Ex. 13 and R. Ex. 4 matched the text messages provided in GC Ex. 3.

Text Message Chart This chart is a compilation of evidence already in the record including GC-3 (Text messages) and GC. Ex. 13 and R. Ex. 4). (telephone records of Anderson and Scherrer)			
(347) 981-3889 - Claudio Anderson | (845) 863-4673 - David Scherrer			
Date and Time (EST)	**Sender**	**Recipient**	**Text from Message**
7/29/2015 7:19 AM	**(845) 863-4673**	**(347) 981-3889**	
7/29/2015 9:53 AM	**(347) 981-3889**	**(845) 863-4673**	
7/30/2015 7:06 AM	**(347) 981-3889**	**(845) 863-4673**	
7/30/2015 8:01 AM	**(347) 981-3889**	**(845) 863-4673**	**Sorry David I thing today is Friday**
7/30/2015 4:11 PM	**(347) 981-3889**	**(845) 863-4673**	**Hi david I can work tomorrow and Saturday?**
7/30/2015 8:36 PM	**(845) 863-4673**	**(347) 981-3889**	**What's Going on with u?**
7/30/2015 8:37 PM	**(845) 863-4673**	**(347) 981-3889**	**U working for Redhook or u working in the union?**
7/30/2015 11:04 PM	**(347) 981-3889**	**(845) 863-4673**	
7/30/2015 11:06 PM	**(347) 981-3889**	**(845) 863-4673**	
7/31/2015 1:02 PM	**(347) 981-3889**	**(845) 863-4673**	
7/31/2015 1:44 PM	**(347) 981-3889**	**(845) 863-4673**	
7/31/2015 3:41 PM	**(347) 981-3889**	**(845) 863-4673**	
7/31/2015 3:42 PM	**(845) 863-4673**	**(347) 981-3889**	
7/31/2015 3:44 PM	**(347) 981-3889**	**(845) 863-4673**	
7/31/2015 3:44 PM	**(845) 863-4673**	**(347) 981-3889**	**U got to tell me what's going on**
7/31/2015 3:45 PM	**(347) 981-3889**	**(845) 863-4673**	**I was there to talk yo you today but you left**
8/1/2015 6:38 PM	**(347) 981-3889**	**(845) 863-4673**	**Hi david i can star work Monday whit you?**
8/2/2015 10:16 PM	**(347) 981-3889**	**(845) 863-4673**	**Hi David I can star work tomorrow?**
8/2/2015 10:17 PM	**(845) 863-4673**	**(347) 981-3889**	**No right now ! I filled you're spot come meet me tomorrow**
8/2/2015 10:18 PM	**(845) 863-4673**	**(347) 981-3889**	**Not right now**
8/2/2015 10:25 PM	**(347) 981-3889**	**(845) 863-4673**	**What time**
8/4/2015 6:31 AM	**(347) 981-3889**	**(845) 863-4673**	**Hi david good morning what chris said?**

Simply put, the ALJ correctly held that the text messages produced in GC Ex. 3 were authenticated by: Anderson's live sworn testimony; that they were provided to the Board during the course of the investigation in October of 2015: were provided to the Union during its investigation of Anderson's discharge in October (GC Ex. 8): and were corroborated by the phone records of both Anderson and Scherrer in GC. Ex. 13 and R. Ex. 4.

3. Respondent's argument about the whereabouts of Anderson's cell phone is an attempt to distract from Scherrer's unlawful activity.

Respondent attempts to call into question the authenticity of Anderson's screenshots of the text conversation between Anderson and Scherrer based upon Anderson's transfer of the cell phone he used to another person. It is important to note at the outset that the questions about Anderson's cell phone arose in the context of a subpoena sent to Anderson by Respondent dated February 22, 2015. (Tr. 1023). Anderson was in Panama from February 14-22, 2015, where he gave his cell phone to his sister who reset the device and is using it for her personal use. (Tr. 944 and 1023). Only upon returning from Panama, did Anderson receive Respondent's subpoena, and when he did, Anderson produced to Respondent the text messages he retained. The entirety of the text messages produced to Respondent were then included in GC Ex. 3.

Respondent seeks to create wild conspiracy theories about Anderson giving the phone away, because it helps to distract from the fact that Anderson retained the unlawful relevant text messages which he provided to the Board during the investigation. Respondent totally ignores that Anderson took steps to preserve the unlawful text message by taking a screenshot of the message and providing it to the Board and the Union.

Further, Respondent's pointing to Anderson's lack of possession of his cell phone is clearly self-serving because Respondent's witness David Scherrer was issued a similar, though significantly narrower subpoena seeking his text messages, but Scherrer was not able to produce a single text messages at all. Scherrer testified that he used two cell phones for work, one personal and one from the company. Scherrer testified that he got a new work cell phone and was thus unable to provide any text messages from his work phone. Scherrer also testified that he regularly texted and called Anderson using his personal cell phone (Tr. at 213-214) and that he did at one point have Anderson as a contact in his phone (Tr. at 232). However at the time of the

trial Scherrer did not even have Anderson's contact information in his phone, had no record of Anderson's phone number in his work or personal phones, and had no text messages from Anderson in his phone. Scherrer's phone contains no trace of ever having contacted Anderson either by phone call or text message, despite phone records showing that the two sent text messages to each other a minimum of 22 times between July 29 and August 4, 2015. Scherrer further testified that he does not have a habit of deleting text messages on his phone and offered no explanation why there is no record of any contact with Anderson on the device. (Tr. 211). Respondent's argument about the whereabouts of Anderson's physical device, and accusations of spoliation, while ignoring the fact that Scherrer still has his device but mysteriously it has no trace of any communication with Anderson belies belief. Respondent is simply trying to deflect attention from the fact that Scherrer unlawfully interrogated Anderson, and that, suspiciously, Scherrer's phone had no record of any of the messages at issue.

Respondent's arguments about the text messages being unauthenticated must fail. Rule 901(a) of the Federal Rules of Evidence states that the "requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." In the instant matter, Anderson was present to testify as to how the text messages were created, demonstrated how to take a screenshot before the ALJ and Respondent, and testified about providing the text messages to the Board and Union. All of that evidence coupled with Anderson's testimony was sufficient to authenticate the text messages under rule 901.

In *US v. Serlin*, the 11th Circuit held that the Government had successfully authenticated a text message through the testimony of an FBI agent who identified the telephone numbers associated with the text messages and was able to match those numbers to the individuals

associated with those numbers. 466 Fed.Appx. 792 (2012). The Circuit held that, "[t]he jury could infer that both of those individuals were the authors of the messages from each one's respective phone numbers." *Id.* In this case, both Scherrer and Anderson put their phone numbers into the record, telephone records show that text messages were sent between those phone numbers, and the text message time stamps in GC Ex. 3 match the phone records showing text messages between those numbers. All of that evidence exists notwithstanding the fact that Anderson was able to testify about how he took the screenshot, and what he observed when he read the text messages.

4. Respondent's argument about the rule of completeness is misplaced.

Respondent argues that in the absence of all of Claudio Anderson's text messages to David Scherrer, an ALJ cannot find that the message on July 30 constituted an unlawful interrogation. The Respondent argues that the July 30 text message might be taken out of context of a larger conversation in which it was appropriate for the Respondent to refuse Anderson work and ask him if he was working for Red Hook or the Union. This argument is patently absurd in light of the question posed by Anderson to Scherrer and Scherrer's response.

First, the phone records show that the text messages contained on page 1 of GC Ex. 3B constitute the full response from Scherrer on July 30. On July 30, Anderson asked Scherrer if he had work for him and Scherrer responded by asking Anderson what was going on with him and whether he was working for Redhook or the Union. Phone records show that Scherrer sent no further text messages to Anderson on July 30 and that there could not have been an attempt to put that statement in context.

Respondent cites as support for their attack on the ALJ's decision to admit GC Ex. 3 the Rule or Completeness which stems for Federal Rule of Evidence 106. Respondent raised this

argument about the rule of completeness for the first time in its Exceptions. During the hearing and in its motion to dismiss, Respondent argued that the text messages should be excluded because without the full 60 days of text messages, the proper context of the text messages could not be understood.

Respondent's argument concerning the Rule of Completeness is misplaced. What Respondent fails to grasp about the rule of completeness is that the unlawful interrogation text messages are complete. As the First Circuit wrote in *United States v. Boylan,* 898 F.2d 230, 256 (1st Cir.1990), "[T]he threshold question under Rule 106 is always one of defining the entirety: that is, if Rule 106 applies, what is it that must be complete?" Based on the subpoena issued to Anderson in this matter in which Respondent subpoenaed 60 days' of text messages, Respondent outlandishly views two months' of interactions as the thing to be completed. Respondent would argue that without knowing what Anderson and Scherrer texted about for two months, the Board cannot find two texts on a single day to constitute an interrogation no matter their content. Such a proposition is akin to arguing that if an employer interrogated an employee in person on Tuesday, it would be necessary to examine every interaction between that employer and employee for the month before and after the interaction to determine if it is unlawful. Respondent's argument is nothing more than an attempt to exclude relevant, properly preserved evidence that clearly indicates that Respondent violated the Act by interrogating Anderson. The only truly relevant text messages to the inquiry at hand are the text messages from July 30, during which Scherrer interrogated Anderson and those text messages are complete.

The record evidence shows that on July 30 at 4:11 PM, Anderson texted David Scherrer asking, "Hi david I can work tomorrow and Saturday?" at 8:36 PM Scherrer responded "What's Going on with u?" and at 8:37 PM, Scherrer said, "U working for Redhook or u working in the

union?" The phone records show that Scherrer did not send any other text messages to Anderson that day. The only missing text messages from that day are from Anderson to Scherrer at 7:06 AM, 11:04 PM, and 11:06 PM.

Respondent's argument that Scherrer's comments fit into some large context are self-serving and an attempt to argue now, what the record evidence does not bear out. Respondent had the opportunity to put the text message into a larger context through witness testimony. Conveniently the author of the text messages, Scherrer, was available and testified and yet failed to put the text messages in any larger context during his testimony. Scherrer did not testify to any broader conversation he was having with Anderson that would have warranted questioning Anderson about whether he was working for the Respondent, particularly because Anderson was in the midst of asking to return to work.

In its motion to exclude, the Respondent cited the Board's test in *Rossmore House*, where the Board enunciated its interrogation test as "whether under all the circumstances the alleged interrogation reasonably tends to restrain, coerce, or interfere with the employees in the exercise of rights guaranteed by the Act." s*upra*. Respondent argues that because the Board called for an examination of "all the circumstances," suddenly the entirety of the text messages between Scherrer and Anderson are necessary to determine if an employer asks an employee "U working for Red Hook or u working for the Union" is unlawful. Respondent misconstrues Board law. Phone records show that on August 30, the date of the interrogation, Scherrer sent only two text messages to Anderson. Those text messages are captured in the screenshots in GC Ex. 3B, and only those July 30 text messages are offered to show that Respondent unlawfully interrogated Anderson and had knowledge of his union activity.

Respondent had the opportunity to question Anderson about the context of the text messages and have its own witness Scherrer explain why he was questioning Anderson about his union activity, which Respondent failed to do. Scherrer testified that he had no specific recollection of *any* text messages he exchanged with Anderson. Respondent cannot simultaneously put on a witness who has no recollection of something that is reflected in Respondent's own phone records and then blame Anderson for not taking screen shots of text message exchanges where there is no allegation of unlawful activity. The question in this case is whether Respondent violated the Act when it interrogated Anderson about his union activity on July 30. Based on Anderson's testimony and the text message screenshot in GC Ex. 3, that question must be answered in the affirmative.

The ALJ correctly considered the text messages from July 30, considered Anderson's testimony about those messages and found that by his text messages on July 30, Scherrer unlawfully interrogated Anderson about his Union activity. That decision was correct and based on ample corroborating evidence.

B. Respondent violated Sections 8(a)(1) and (3) of the Act by terminating Claudio Anderson.

1. Applicable legal standard

The ALJ correctly held that Respondent terminated Anderson. The ALJ credited Claudio Anderson's testimony that on or about August 3, 2015, he went to Respondent's facility to speak to David Scherrer. Scherrer also recalls that Anderson met with him that day, and the two discussed that Respondent did not have any more work for Anderson. Anderson reported that Scherrer told him he had to speak to Nick Rodriguez. Anderson reached Rodriguez by phone and Anderson asked Rodriguez why Anderson could not work for Red Hook. Rodriguez told Anderson that Garofalo, who is the boss, said that Anderson and other guys could not work for

Red Hook anymore. (Tr. at 60-62). Anderson asked Rodriguez to send him a letter showing the reason Anderson was fired, but he was never sent a letter. (Tr. at 62). Anderson did not work for RHCG after that date.

Section 8(a)(3) makes it unlawful to terminate an employee for the purpose of discouraging Union activity or in retaliation for Union activity. Under the traditional *Wright Line*[7] test, the General Counsel has the initial burden of establishing that an employee's protected activity was a motivating factor for the adverse employment action taken against the employee. The General Counsel meets this initial burden by showing: 1) that the employee was engaged in protected activity, 2) that the employer had knowledge of that activity; and 3) that the employer harbored animus towards the employee's protected activity. See, e.g. *Lee Builders, Inc.*, 345 NLRB 348, 349 (2005); *Willamette Industries, Inc.*, 341 NLRB 560, 562, 563 (2004); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). As will be discussed, in the current case, each of these three factors has been established.

In the instant case, Anderson's termination occurred days after he went to the offices of Local 79, the Charging Party Union and signed paperwork there. Anderson was with other employees of Respondent at the time that he signed the paperwork. Days after he signed the paperwork, Anderson sent text message to David Scherrer asking if Scherrer had work for him, and received in response two text messages reading, "What's going on with u?" and "U working for Redhook or u working in the union?" Anderson repeatedly asked Scherrer if there was work he could do, and on August 3 Anderson went to meet with Scherrer at the Tillotson Avenue site where Scherrer told Anderson there was no work and to contact Nick Rodriguez. Once Anderson was able to get Rodriguez on the telephone, Rodriguez told Anderson that there was no work for

[7] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

him and others and that this decision was made "the boss" Christopher Garofalo. The evidence shows Respondent knew of Anderson's union activity as demonstrated by Scherrer's text message on July 30. Subsequently, Scherrer himself refused to give work to Anderson, and Scherrer directed him to Nick Rodriguez. Rodriguez then informed Anderson that there was no work for him. The General Counsel has met its initial burden of establishing the unlawful discharge.

2. Respondent denies Anderson was ever terminated and fails to make out a *Wright Line* Defense.

Respondent argued repeatedly during its case in chief that it did not terminate Anderson, but rather that Anderson gave up his job by going on vacation, but it does admit that Scherrer told Anderson he did not have work for him. Respondent's exception that the ALJ incorrectly applied *Wright Line* misinterprets the defensive standard set forth in *Wright Line.* The ALJ appropriately credited Anderson's version of events and found that Counsel for the General Counsel made out its *prima facie* case, writing, "In my opinion, the evidence shows, contrary to the Respondent's defense, that Anderson was indeed discharged…The text messages also show that the reason for Anderson's discharge was the company's belief that he was becoming involved with the union." (Decision at 4). The ALJ clearly found that the Counsel for the General Counsel made out a *prima facie* case.

Once the General Counsel makes a *prima facie* showing sufficient to support the inference that protected conduct was a motivating factor in the employer's adverse employment action, the burden of persuasion shifts to the employer to prove that it would have taken the same adverse employment action, even in the absence of the employee's protected activity. *Wright*

Line, *supra*.[8] The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade by a preponderance of the evidence that the action *would* have taken place even absent the protected conduct. *Williamhouse of California, Inc.*, 317 NLRB 699, 715 (1995) (citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984)); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). If the employer's asserted reasons are found to be false, the Board may infer that the reason for the discharge was unlawful. *Yesterday's Children, Inc.*, 321 NLRB 766, 768 (1996) (citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966)). If an employer fails to satisfy its burden of persuasion, a violation of the Act should be found. *Id.* Applying this analysis to the current case, Respondent violated the Act when it terminated Anderson.

In this case, Respondent's defense is that Scherrer did not terminate Anderson's employment, and that Anderson was instructed to reach out to another supervisor in the concrete division. (Tr. at 24). Respondent's defense is that Anderson was simply never terminated, but rather was laid off because there was no need for more work at Tillotson. (Tr. at 26). Respondent further argues that because Anderson is a concrete worker and not a demolition worker, Respondent could not have terminated Anderson for his union activity because the petition that was filed concerned only the demolition division. Respondent's defenses fail on both counts.

First, Respondent's argument that there was not enough work to contact Anderson fails. In the month of August alone, Respondent hired 23 new concrete workers, including two who specifically worked at the Tillotson Avenue site on August 24 and 31.

Additionally, Respondents own testimony about its practices demonstrates that Anderson alone was not responsible for finding his next assignment. When testifying about how Anderson

[8] The same pretext evidence used to prove discriminatory motive may show that the employer had not established that it would have taken the same adverse action absent the employee's protected activity. *Wright Line*, *supra* at 1091.

came to work at the Broadway and Tillotson jobsites, Scherrer testified that "I think someone called and asked me if I needed a guy and then it was Claudio." (Tr. 284). Further, Scherrer testified that employees were directed to him by Vice President Tommy Frangipane, and that Scherrer also had a core crew of people he pulled from. When asked how employees move to jobsites after a project is completed, Sherrer testified that "Some might come with me, some might go somewhere else…it depends on what we're doing. I mean it's like if I'm just - - say hey, I need two guys today and the crew that I had had 10 guys, you know, maybe the eight guys, my supervisor will go and say hey, alright maybe send eight guys to do another, you know, concrete job for a week or two, until you need them back." (Tr. at 278). Scherrer's testimony makes it clear that Respondent has a process that includes Tommy Frangipane and supervisors like Scherrer directing workers to different jobsites as work ebbs and flows.

Scherrer was questioned about why Anderson was never recalled to work in any of the intervening months and was not able to offer a credibly response beyond repeating that there was no work for him at Tillotson. Respondent bears the burden of presenting its *Wright Line* defense, and Respondent has failed to show that in August its work was slowing down to the point that it needed to lay off Anderson for lack of work. Crucially, the person who would know whether there was in fact work at other concrete sites was Tommy Frangipane, but Frangipane never testified. Instead, Respondent put on Chris Garofalo to testify about the demolition division practices. Respondent's failure to call Frangipane who was Scherrer's supervisor, the person who directed employees to different work sites, supplemented crews at different work sites, and had ultimate control of the concrete division is a fatal defect in Respondent's case. Respondent cannot argue that there was no work for Anderson if the person who was aware of the amount of work at the company at the time did not testify at the hearing.

Respondent's explanation that Anderson walked off the job without being terminated is far-fetched, particularly because Scherrer admitted he told him there was no work. Instead, Scherrer refused to give Anderson work on July 30 and interrogated him about his union activity, demonstrating that Respondent's knowledge of his union activity was linked to the refusal to give him work. On August 3, when Anderson met with Scherrer in person, Scherrer again refused to give Anderson work and instructed him to contact Nick Rodriguez. Rodriguez then informed Anderson that there was no work for him on a permanent basis. Respondent's continued hiring of employees demonstrates that its defense has no merit.

Respondent's defense that it did not fire Anderson for Union activity because the petition sought demolition and not concrete workers fails for two reasons: First, Respondent began refusing work to Anderson on July 30 and terminated Anderson around August 3, 2015. The petition to represent demolition workers was not filed until August 12, 2015. At the time of Anderson's termination, Respondent would not have known whether the petitioned-for unit would be demolition or concrete employees or both. Respondent's attempt to backdate its defense demonstrates that it is a farce. Further, David Scherrer's text message to Anderson asking if he is working for the union demonstrates that Anderson's union activity was known, and on the minds of Respondent prior to his termination. If Respondent was not concerned about the concrete workers being unionized, Scherrer would have had no reason to question Anderson about his union activity. But Scherrer did question Anderson about his union activity, and thereafter terminated Anderson's employment to discourage it.

3. The ALJ Correctly held that Nick Rodriguez is an agent of the employer

The ALJ credited Anderson's testimony that Nick Rodriguez notified Anderson that "the boss didn't want him working for the company anymore" and that "it was shown that

[Rodriguez] acts as a messenger between the company and the Spanish speaking employees and that he has been used to transmit notifications of terminations." (Decision at 4).

Testimony throughout the hearing testimony was elicited demonstrating that after David Scherrer's refusal to provide work to Anderson and following Scherrer's repeated refusal to give work to Anderson, Scherrer referred Anderson to Nick Rodriguez. Nick Rodriguez then conveyed to Anderson that there was no work for him and others and that the order came from "the boss" Christopher Garofalo.

In determining whether Rodriguez is an Agent of Respondent and therefore that his conduct is attributable to the employer, the Board applies common law agency principles.

> In determining whether an employee is an agent of an employer and thus whether his or her conduct is attributable to the employer, the Board applies common law agency principles. If the employee acted with the apparent authority of the employer with respect to the alleged unlawful conduct, the employer is responsible for the conduct. "Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question."… the Board considers whether, under all the circumstances, the employee would reasonably believe that the alleged agent "was reflecting company policy and speaking and acting for management." Section 2(13) states that "whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."
> The position and duties of the employee alleged to be an agent are relevant in determining agency status. Thus, an employee's statement may be attributed to the employer if the employee is "held out as a conduit for transmitting information [from the employer] to the other employees." The Board also considers whether the alleged agent's statements or conduct were consistent with those of the employer. *D&F Industries, Inc., And Staffing Services America, Inc. ("Olsten"),* 339 NLRB 618 (2003).

In *D&F Industries,* the Board applied the agency principles and found agency status where employees were "accustomed to receiving authoritative information on both personnel policies and production matters from [the company] through the [alleged agents], and would reasonably view these conversations in light of that experience." (Id.)

Here, Rodriguez himself testified that he routinely acts as a translator for management when communicating with employees. In translating for management, Rodriguez testified that

he has conveyed terminations to employees without Chris Garofalo present. (Tr. at 703). Rodriguez testified that Garofalo may call him on the phone and direct Rodriguez to inform an employee that the employee is terminated. (Id.) Rodriguez also testified that, on Garofalo's instructions and without Garofalo present, he has directed employees' work and told employees to move to other job sites. (Id.) Rodriguez does this work solely for Chris Garofalo and does not take direction from other supervisors. (Tr. at 704 and 724). Rodriguez also acts as a liaison between Garofalo and the jobsite supervisors. (Tr. at 723). Rodriguez reported that he would transport employees between jobs and report to supervisor of sites Garofalo's orders. (Id.) Rodriguez is also paid on a salary basis, while other demolition employees are paid hourly, and Rodriguez is on the company health plan, while other demolition workers are not. (Tr. at 727-29). The evidence shows that Rodriguez routinely conveys directions to employees at the direction of Garofalo and a reasonable employee would assume that Rodriguez is a conduit through which Garofalo directs employees and gives orders. Further, when informing Anderson that there was no longer work for him, Rodriguez cited Garofalo as the source of the termination, and thus it was reasonable for Anderson to believe that the direction was coming from Garofalo himself. Based on this evidence the ALJ correctly concluded that Nick Rodriguez is an agent of Respondent within the meaning of 2(13) of the Act, and his statements to Anderson are sufficient to hold the employer accountable for Rodriguez's statements.

4. Anderson testified credibly about the conversation with Nick Rodriguez

Anderson credibly testified about his interaction with Nick Rodriguez, while Rodriguez's version of events does not stand up to scrutiny. First, Anderson testified that he spoke to Rodriguez on the phone. Rodriguez testified that he was at Tillotson Avenue dropping off a piece of equipment and spoke to Anderson in person. (Tr. 704). Rodriguez testified that the only time

he spoke to Anderson during the entire course of Anderson's employment was that day at Tillotson. (Id.) Rodriguez further testified that Anderson walked up to him and thanked Rodriguez for hiring him. (Tr. 705). Rodriguez responded that he did not do the hiring, Chris Garofalo did the hiring. (Id.)

Rodriguez's story defies credibility. Rodriguez testified that he only dealt with demolition work and Chris Garofalo testified that there was no overlap between demolition and concrete. Rodriguez's apparently coincidental presence in the Bronx on a concrete site is abnormal if in fact there is such a large division between concrete and demolition. Additionally, if Rodriguez had never met or spoken to Anderson prior to that interaction, Anderson would have no reason to thank Rodriguez for hiring him. Furthermore, if there were no demolition workers on the site, Rodriguez's response that Chris Garofalo did the hiring, would also make no sense, if in fact Anderson was a concrete worker, because Garofalo testified he only deals with demolition. This version of events clashes with the Respondent's own constructed defense. Respondent cannot have it both ways.

What is far more likely, and what is demonstrated by the record evidence, is that Anderson called Nick Rodriguez after being instructed to do so by David Scherrer, and Rodriguez relayed that Christopher Garofalo said there was no work for Anderson and others.

Simply put, Anderson repeatedly and on multiple days texted David Scherrer to ask if he had work, and Scherrer's response was to question if Anderson was engaging in Union activity and to refuse to give Anderson work. Rodriguez's phone call served as the final moment in a series of actions by Respondent's supervisors and agents to terminate Claudio Anderson because of his support for Local 79.

VI. Conclusion

Counsel for the General Counsel submits that, based on the entire record, and based on the ALJ's credibility determinations and direct observation of the demeanor of the witnesses at trial, the ALJ decision should be upheld by the Board. Counsel for the General Counsel has shown that Respondent violated the Act by interrogating Claudio Anderson, terminating Anderson because the Respondent believed he was part of the union organizing. Respondent's defenses lack credibility and are undermined by the records produced at hearing, particularly the cell phone records, history of hiring, and witness testimony.

Therefore, it is respectfully urged that the Board affirm the decision of the ALJ, find that Respondent violated Sections 8(a)(1) and (3) of the Act, and grant any and all appropriate relief under the Act, including make-whole relief for Claudio Anderson and a posting of a notice at Respondent's facilities in which employees are assured of their Section 7 rights and in which Respondent promises to cease and desist from its unlawful conduct.

Respectfully Submitted,

/s/ Erin E. Schaefer

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